Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Verizon Telephone Companies	)	Transmittal No. 465
Tariff F.C.C. No. 20	)	
	)	

EARTHLINK PETITION TO REJECT, OR TO SUSPEND AND INVESTIGATE

EarthLink, Inc. ("EarthLink"), pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, hereby petitions the Commission to suspend, investigate and reject relevant portions, as described below, of the above-captioned transmittal filed by the Verizon Telephone Companies ("Verizon") on July 2, 2004 ("Transmittal" or "Transmittal No. 465").

In the Transmittal, Verizon proposes to introduce a new restriction on purchasers of its Infospeed DSL Solutions service: "Verizon Infospeed DSL Solutions arrangement will be provisioned over available facilities over which Company provides local telephone service pursuant to its general and/or local exchange tariffs." Transmittal, § 5.1.2.D. This is an unreasonable and unjust restriction that prevents Internet Service Providers ("ISPs") like EarthLink from serving end user customers who choose to obtain local voice service from competitive local exchange carriers. As such, the restriction is contrary to the purposes of encouraging competition in the local voice market under the Act and an "unreasonable and unjust" tariff restriction in violation of Section 201(b) of the Act. Further, because it unreasonably denies service to one set of end users (i.e., those who choose f competitive LEC

voice service), the restriction also constitutes an unreasonable discrimination prohibited by Section 202(a) of the Act.

Requiring the DSL end user to also subscribe to Verizon local voice service ties the two services together and locks in end users, preventing them from choosing a competitive LEC for local voice service. Thus, the tariff restriction imposes a restriction on the ability of the end user to choose an alternative provider of local telephone service, which conflicts with the purposes of the Telecommunications Act of 1996 and with the Commission's prolific efforts for several years to open the local exchange to competition. Indeed, the U.S. Supreme Court has described the Congressional goal to create local voice telecommunications competition in the Telecommunications Act of 1996 as an "end in itself," and has noted that the Act provides "aspiring competitors every possible incentive to enter local telephone markets . . . ."[1] Such a DSL service restriction are also contrary to the goals of Section 706 of the Telecommunications Act of 1996 to encourage the deployment of broadband services, since it prevents otherwise eligible end user customers from choosing broadband ISPs that use the Verizon DSL as last-mile broadband transport service.

Significantly, several state Commissions have considered such incumbent LEC DSL service restrictions and ruled that they are illegal and fundamentally inconsistent with the object of the Telecommunications Act of 1996 to open to the local voice markets to competition. Just last month, the California Public Utilities Commission determined that SBC's practice of rejecting local voice service switch requests for customer who are also SBC Yahoo! DSL

[1] Verizon Communications, Inc. v. FCC, 535 U.S. 467, 476, 489 (2002). While the Commission did find, in the course of the *Louisiana/Georgia 271 Order* (¶ 157), that ""under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities," that was in the context of review of compliance with the OSS checklist item, and did not consider whether a service restriction as Verizon proposes would constitute an "unjust and unreasonable" practice.

subscribers violated state law that all practices be "just and reasonable" and is a "barrier to competition and discrimination among customers in the local voice market," and ordered SBC to "cease this anticompetitive and discriminatory behavior."[2] Similarly, the Georgia Public Service Commission found that BellSouth's practice of refusing to provide DSL service to CLEC voice end users was "anticompetitive" in violation of state law because "BellSouth uses the tying arrangement [between local voice service and DSL service] to insulate its voice service from competition by impairing the customers ability to choose its provider of local service."[3] In Florida, the Public Service Commission found that "this practice raises a competitive barrier in the voice market" and ordered BellSouth to "continue to provide FastAccess [DSL] even when BellSouth is not longer the voice provider because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act . . .."[4] Similarly, the Michigan Public Service Commission has found that Ameritech's practices "impair the interest of competitors seeking to provide voice service over Ameritech Michigan's LFPLs [low frequency portion of the loop]," and ordered "Ameritech Michigan to institute procedures that allow CLECs to obtain the voice service over a LFPL when the same line is being used to provide DSL service."[5]

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[2] Telscape Communications Inc. v. Pacific Bell Tel. Co., Case 02-11-011, 2004 Cal. PUC LEXIS 235, *36 (June 9, 2004).

[3] *In Re: Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc.*, Order on Complaint, Georgia Public Service Commission Docket No. 11901-U, at 18 ((November 19, 2003).

[4] *In re: Petition of Florida Digital Network, Inc.*, Docket No. 010098-TP; Order No. PSC-02-0765-FOF-TP, 2002 Fla. PUC LEXIS 201, *12 and *15 (June 5, 2002).

[5] *In the Matter of the Complaint of the Competitive Local Exchange Carriers Association of Michigan*, Opinion and Order, Case No. U-13193, at 15 (June 6, 2002). *See also, Louisiana Public Service Commission, In re: BellSouth's Provision of ADSL Service to End-Users over CLEC Loops*, Order R-26173, at 5 (December 18, 2002) (adopting staff recommendation that "BellSouth's policy actually deters customers from switching to other providers, thus hindering

Further, the Commission has a pending proceeding on the matter, WC Docket No. 03-251, which was initiated when BellSouth filed for preemption from the Georgia Public Service Commission ruling cited above. It is entirely inappropriate for Verizon to impose this anticompetitive restriction across its multistate region before the Commission has spoken on the matter.

With Transmittal No. 465, Verizon has now taken this divisive local voice competition issue and inserted into Verizon Tariff No. 20, presumably for whatever "filed rate doctrine" effect it may have over FCC and state commission deliberations. The Commission should not allow Verizon to assume that the Commission is not vigilant when it unilaterally seeks to impose unreasonable and contentious service restrictions through the FCC tariffing process. Instead, the Commission should, at a minimum, investigate this tariff provision fully. As stated above, and as confirmed by the many state commissions that have examined the issue in detail, it is too important to local voice and broadband competition to allow Verizon to institute this restriction and hope that post-tariffing proceedings will sort it out. Verizon has also argued that the validity of such DSL service restrictions are properly challenged before the FCC, and not before state Commissions: "if any carrier or customer wishes to pursue a claim that the terms of BellSouth's tariff are unlawful . . . such a case would arise under the jurisdiction of the Commission . . . ."[6]

EarthLink believes that the patent anticompetitive effects of the tariff restriction warrant that the tariff language be rejected by the Commission. Alternatively, EarthLink believes that a

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competition not only in the voice market, but the DSL market as well."); Kentucky Public Service Commission, *In the Matter of Petition of Cinergy Communications Company*, Order, Case No. 2001-00432, at 7 (July 12, 2002), *aff'd, BellSouth Tel, Inc. v. Cinergy Communications Co.*, 297 F. Supp. 2d 946 (E.D. Ky. 2003) ("Its practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers.")

[6] Reply Comments of Verizon, CC Docket No. 03-251, at 22 (filed Feb. 20, 2004).

suspension and investigation of the tariff language would be necessary to determine whether the apparently anticompetitive language is justifiable. We note that Verizon will not be harmed by an investigation, as it is currently operating without this restriction and its absence has imposed no apparent harm to it. ISPs such as EarthLink, however, face irreparable injury unless the language is suspended and investigated, since potential customers will be lost when the ISP cannot service the customer due to the lack of availability of the Verizon DSL transport service.

Accordingly, EarthLink urges the Commission to reject or to suspend and investigate the proposed tariff restriction in Transmittal No. 465, because it violates Sections 201(b) and 202(a) of the Communications Act.

Respectfully submitted,

/s/

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Dated: July 9, 2004

CERTIFICATE OF SERVICE

I, Sybil Anne Strimbu, state that copy of the foregoing "EarthLink Petition to Reject, or to Suspend and Investigate" was filed electronically with the FCC this day, July 9, 2004, and copies were delivered by hand to the following:

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